



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

9/1/03
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Examiner: Niki Marina Eloshway

Group Art Unit: 3727

In re application of:

GARY L. MENGEU

Serial No.: 09/930,079

Filed: August 15, 2001

**A PACKAGE INCLUDING A
CONTAINER WITH A WIDE-
MOUTH SPOUT AND ENCLOSURE
SEALING THE SPOUT**

Attorney Docket No. 035373-00104

APPEAL BRIEF OF APPLICANT

August 28, 2003

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

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Dear Sir:

1. Real Party in Interest

The real party in interest is Silgan Plastics Corporation.

2. Related Appeals and Interferences

There are no related appeals or interferences known to Applicant.

3. Status of Claims

Claims 1-4 and 10-13 stand finally rejected and are on appeal. Claims 5-9 depend from Claim 1 and stand objected to as being allowable but dependent from the rejected base claim.

4. Status of Amendments

None of the claims were amended during prosecution.

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5. Summary of the Invention

The invention is directed to a package 1, which as best seen in Figures 1 and 4, includes a molded plastic container 3 having a main body 5 of any suitable configuration. An upper portion 7 of the main container 5 is cylindrical and is provided with closure-engaging members 9, which in the exemplary embodiment of the invention, are threads. A spout 11 extends upward and inward from the cylindrical upper portion 7 of the main container body and is topped with an upwardly and outwardly flared portion 14 that terminates in a rim 15 defining a container opening 17.

The package 1 further includes a closure, which is shown in section in Figure 2. The closure 19 has a circular end wall 21 that extends across the container opening 17 when in place on the container as shown in Figure 4. A skirt 23 extends outward and downward from the periphery of the end wall 21. The skirt 23 terminates in a cylindrical section 25 that overlies the cylindrical upper body portion 7 of the container when the closure is applied to the container. As illustrated in Figure 2, the skirt has an inner surface 27 which has, adjacent its lower end 29, container-engaging members 31 that mate with the closure engaging members 9 on the container 3, and therefore, in the exemplary embodiment are threads.

The package 1 also includes sealing elements 33 that seal the container opening when the closure is in place on the container 3. The sealing elements include a first seal 35 comprising an annular sealing flange 37 extending downwardly and inwardly from the end wall of the closure, and as best seen in Figure 3, having an outer sealing surface which engages seals against an inner sealing surface 41 on the flared portion 13 of the container 3. An annular upper portion 43 of the inner surface 27 of the skirt formed by an annular rib 45 extends downwardly and outwardly from the end wall to form with the sealing flange 37 and upwardly converging annular gap 47 into which the rim of the container 3 is wedged as the closure is threaded onto the container.

As best seen in Figure 2, the sealing elements 33 include a second seal 55 formed by an annular bead 57 integrally molded on the lower portion 59 of the inner surface 27 of the skirt in the cylindrical section 25. This bead 57, which is above the container engaging members (threads) 31 seals against the cylindrical upper portion 7

of the main body 5 of the container above the closure engaging members (threads) 9 as shown in Figure 4 to provide a double seal which assures that moisture does not enter the container.

6. Issues

1. Did the Examiner err as a matter of law in rejecting Claims 1-4 directed to a package comprising a container with a specific configuration including a spout topped by a flared portion, a closure, and a particular seal between the flared portion and the closure, as being anticipated under 35 U.S.C. § 102(b) by the Montgomery reference that discloses a package in which the container does not have a spout and in which a different seal arrangement is used between the container and the closure?

2. Did the Examiner err as a matter of law in rejecting Claims 10 and 11 that are directed to the package described in Issue 1, which further comprises an additional seal between the closure and the container below the spout as also being anticipated under 35 U.S.C. § 102(b) by the Montgomery reference, when the package in the Montgomery reference has, in addition to the differences cited in Issue 1, no additional seal in the claimed location.

3. Did the Examiner err as a matter of law in rejecting Claims 12 and 13, which are directed to a package comprising a container with a spout terminating in a rim defining a container opening, a closure, a first seal between the closure and the container opening, and a second seal between the container and the closure below the spout, as anticipated under 35 U.S.C. § 102(b) by the Montgomery reference, which discloses a different package in which the container does not have a spout and there is no second seal in the location claimed.

7. Grouping of the Claims

Group I: Claims 1-4 stand or fall together.

Group II: Claims 10 and 11 stand or fall together.

Group III: Claims 12 and 13 stand or fall together.

8. Argument

Issue 1.

Did the Examiner err as a matter of law in rejecting Claims 1-4 directed to a package comprising a container with a specific configuration including a spout topped by a flared portion, a closure and a particular seal between the flared portion and the closure, as being anticipated under 35 U.S.C. § 102(b) by the Montgomery reference that discloses a package in which the container does not have a spout and in which a different seal arrangement is used between the container and the closure?

Claims 1-4 of Group I were rejected as being anticipated under 35 U.S.C. § 102(b) by Montgomery (US 5,738,231). Claim 1 is directed, in pertinent part, to a package comprising: a container having a main body with an upper portion having closure-engaging members thereon, and a spout extending upward and inward from an upper portion of the main body and topped with an upwardly and outwardly flared portion terminating in a rim defining a container opening, a closure. . . and sealing elements including an annular sealing flange extending downwardly and inwardly from [an] end wall of the closure and having an outer sealing surface which engages an inner sealing surface on the flared portion of the container, and an annular upper portion of the inner surface of the skirt inclined downwardly and outwardly relative to the outer surface of the annular sealing flange to form with the annular sealing flange an upwardly converging annular gap into which the rim of the container is wedged as the container engaging members on the closure and the closure engaging members on the container engage.

Thus, Claim 1 is directed to a package comprising a container having a flared spout and a closure that seals against the inner surface of the flared spout and forms an upwardly converging annular gap into which the flared portion of the spout is wedged to further seal the container opening.

Montgomery, on the other hand, is directed to a tamper-indicating threaded closure-container package in which an annular flange 32 extends upward from a lip 30 on the neck of a container. This annular flange 32 is molded to extend axially as shown in figure 3 of the reference. It is deformed upwardly and outwardly upon entering a gap formed between the downwardly and inwardly extending surface 38 on an annular skirt 36 of the closure and the downwardly and inwardly directed upper

surface (no reference character) on the projection 40 on the inner surface of the outer skirt of the closure as shown in Figure 4. This annular flange 32 takes a permanent set in this outwardly flared direction so that when the closure is removed from the container and reapplied, this annular flange engages the underside of the projection 40, as shown in Figure 5, preventing the closure from being fully lowered onto the container neck, thereby providing an indication that the container has been opened. Hence, from the broad perspective, it can be seen that the package of Claim 1 and the package of Montgomery are constructed to perform much different functions. Furthermore, when the details of Claim 1 and the Montgomery package are scrutinized, it can be seen that the reference does not teach the arrangement called for in Claim 1. The final Office Action mailed on May 1, 2003 asserts in paragraph 4 of the Detailed Action that the Montgomery package has a spout identified by the “element 16, above the closure-engaging member 28, which extends upwardly and inwardly in the area at 30 and 32 in figure 3”.

In order for a reference to anticipate a claim, it must disclose the identical invention in as complete detail as is contained in the claim. *Richardson v. Suzuki Motor Co.*, 868 Fed. 2d 1226, 1236, 9 USPQ 2d 1913, 1920 (Fed. Cir. 1989). Claim 1 calls for the container to comprise, in pertinent part: 1) an upper portion 7 of the container main body (on which the enclosure-engaging members, *e.g.*, threads 9, are located); 2) a spout 11 extending upwardly and inwardly from the upper portion; and 3) an upwardly and outwardly flared portion 13 topping the spout and terminating in a rim. The element 16 of Montgomery corresponds to the “upper portion” of the main body of Montgomery’s container “having closure engaging members” (threads 28) thereon. The threads of Montgomery are, of course, helical and the Office Action refers to figure 3 wherein the section shown is through the lowest point of the thread. Reference to figure 5 shows that the thread extends essentially fully up the “upper portion” 16 of the container. The “upwardly and outwardly flared portion” 32 is mounted directly on the upper portion 16 of the main body of the container. There is no spout above the upper portion of the main body in Montgomery. Clearly, the horizontal lip 30 in Montgomery does not correspond to the conventional definition of a spout. As the Court of Appeals for the Federal Circuit has established

Terms used in the claims bear a ‘heavy presumption’ that they mean what they say and have the ordinary meaning that would be attributed to those words by persons skilled in the relevant art It has long been recognized in our precedent ... that dictionaries, encyclopedias and treatises are particularly useful resources to assist the court in determining the ordinary and customary meaning of claim terms”. *Texas Digital Systems v. Telegenix, Inc.*, 308 Fed. 3d 1193, 1202, 64 USPQ 2d 1812, 1817-18 (Fed. Cir. 2002).

Webster’s New 20th Century Dictionary of the English Language, Unabridged, Second Edition, (made of record in the response dated June 3, 2003), defines “spout” as “a nozzle, pipe, or projection (as on a teapot, sprinkling can, or pitcher), by which a liquid is poured or discharged”. There is simply no spout on the container of Montgomery in the sense called for in Claim 1. The element 16 of Montgomery can not be both the “upper portion” of the main body of the container and a “spout”. As Montgomery is lacking an element of Claim 1, a spout, it cannot anticipate.

In addition, Claim 1 also calls for:

sealing elements including an annular sealing flange extending downwardly and inwardly from the end wall of the closure . . . and an annular upper portion of the inner surface of the skirt being inclined downwardly and outwardly relative to the outer surface of the annular sealing flange to form with the annular sealing flange an upwardly converging gap into which the rim of the container is wedged. . . .

Montgomery does not teach or suggest such an arrangement. While the outer surface of the inner skirt 36 of Montgomery extends downwardly and inwardly at 38, the upper surface of the projection 40 extends parallel to that surface on the inner skirt and not “downwardly and outwardly. . . to form an upwardly converging annular gap into which the rim of the container is wedged.” The Examiner disagrees with this asserting in the Comments portion of the Advisory Action mailed on June 11, 2003, that

“[e]lements 22 and 40 comprise the upper portion of the inner surface of the skirt. At 22 the annular upper portion of the inner surface of the skirt extends downwardly and outwardly and a gap is formed between the element 36 and the upper portion of the inner surface of the skirt (comprised of elements 22 and 40.” [sic]

In order for a reference to anticipate a claim, it must not only have each and every element of the claim, the elements must be arranged as required by the claim, *Lindemann Maschinenfabrik v. American Hoist & Derrick Co.*, 730 Fed. 2d 1452, 1458, 221 USPQ 481, 485 (Fed. Cir. 1984). There, a claim to a hydraulic scrap shear that called for a “side wall divided into two portions of different lengths” was not anticipated by a reference in which the “gags were beyond the end of the side wall and constitute no part of the feed channel side wall as claimed”. In Montgomery, the element 22 forms no part of a gap of the outer surface 38 of the flange 36 into which a “rim of the container is wedged”. In fact, the element 32 in Montgomery never contacts the element 22 and is therefore not wedged by the element 22 into any gap.

Furthermore, while the rejections are based on the initial application of the closure onto the container as shown in figure 4 of the reference, Applicant would like to point out that Montgomery also does not anticipate Claim 1 when the closure is in the second position relative to the container after the container has been removed and replaced, as shown in figure 5. In this second position, the projection 40 does not form “an annular sealing flange extending downwardly and inwardly from the **end wall** of the closure”. Also, the outer skirt of Montgomery does not extend outward and downward from a periphery of the end wall of the closure. Furthermore, the annular flange 32 is not wedged into an upwardly converging annular gap between the projection 40 and a downwardly and outwardly inclined inner surface of the downwardly and outwardly extending skirt. As shown in figure 5 of Montgomery, the annular flange 32 forms an interference with the projection 40, which prevents fully seating the closure on the container upon reapplication. As is evident from figure 5 and as indicated in Montgomery at column 4, lines 55-57, the annular neck flange 32 seals against the lower portion of the projection 40, but is not wedged into any upwardly converging annular gap as called for in Claim 1.

As Montgomery discloses a package with a different configuration which operates in a different way to achieve a different result it does not anticipate Claim 1.

Furthermore, as discussed below in connection with Claim 10, while the Examiner cites the element 22 as being part of the upper portion of the inner surface of the skirt of the closure in rejecting Claim 1, she then equates the same element 22 to the lower portion of the inner surface of the skirt to satisfy an element of Claim 10.

As Claim 10 is dependent on Claim 1, the Examiner is equating a single element of the reference to two different elements in different parts of the claimed structure. The inconsistent identification of elements in a reference is improper. *Id.*

Claims 2-4 all depend from Claim 1 and are therefore patentable over Montgomery for the same reasons.

Issue 2.

Did the Examiner err as a matter of law in rejecting Claims 10 and 11 that are directed to the package described in Issue 1, which further comprises an additional seal between the closure and the container below the spout as also being anticipated under 35 U.S.C. § 102(b) by the Montgomery reference, when the package in the Montgomery reference has, in addition to the differences cited in Issue 1, no additional seal in the claimed location.

Claim 10 was also rejected as being anticipated under 35 U.S.C. § 102(b) by Montgomery.

As Claim 10 depends from Claim 1, it is patentable over Montgomery for the same reasons. Furthermore, Claim 10 calls for the sealing elements to further include an annular sealing member on one of the lower end of the inner surface of the skirt above the container-engaging members and the main body of the container above the closure-engaging members but below the spout sealing against the other. In the exemplary embodiment of the invention, this is the seal 55 formed by the bead 57 (see Figure 2) on the lower portion 59 of the inner surface 27 of the skirt above the threads 31 sealing against the cylindrical upper portion 7 of the main body 5 of the container above the threads 9.

Paragraph 10 of the final rejection asserts that the annular sealing member called for in Claim 10, “is considered to be element 22 which is located on the closure above the container-engaging members”. While the element 22 in Montgomery is located on the closure above the container-engaging members, it does not seal against the container at any point, let alone above the container-engaging members but below a spout. In addition, in paragraphs 5 and 8 of the final rejection, it was asserted that the element 22 was part of the annular upper portion of the inner surface of the closure skirt. It is inconsistent and improper to now claim that the same element 22 is part of the “lower end of the inner surface of the skirt” as called for in Claim 10. *Id.*

In other words, in rejecting Claim 10, which incorporates all the limitations of Claim 1, element 22 was relied upon as constituting the downwardly and outwardly extending **upper portion** of the inner surface of the skirt to form a gap, and also as the annular sealing member on the **lower end** of the inner surface of the skirt. It is improper to find anticipation by using a single element in a reference as corresponding to two claimed elements in distinctly different parts of the claimed combination. *Id.* Therefore, Claim 10 is not anticipated by Montgomery.

Claim 11 depends from Claim 10 is therefore patentable over Montgomery for the same reasons.

Issue 3.

Did the Examiner err as a matter of law in rejecting Claims 12 and 13, which are directed to a package comprising a container with a spout terminating in a rim defining a container opening, a closure, a first seal between the closure and the container opening, and a second seal between the container and the closure below the spout, as anticipated under 35 U.S.C. § 102(b) by the Montgomery reference, which discloses a different package in which the container does not have a spout and there is no second seal in the location claimed.

Group III, Claims 12 and 13, were also rejected as being anticipated under 35 U.S.C. § 102(b) by Montgomery.

Claim 12 is an independent claim which calls for, in pertinent part, a container with an upwardly and inwardly extending spout terminating with a rim, a closure having an end wall and a skirt extending outward and downward with container-engaging members adjacent a lower end of an inner surface of the skirt which engage closure-engaging members on the container, and sealing elements including a first sealing element forming a seal between the container and the closure adjacent the container opening, and a second seal comprising an annular sealing member on one of the lower portion of the inner surface of the skirt above the container-engaging members and on the main body of the container above the closure-engaging members but below the spout which seals against the other. Thus, Claim 12 calls for a seal at the top of the container and a seal between the lower portion of the skirt and the main body of the container below the spout but above the container-engaging members. As discussed in connection with Claim 1, Montgomery does not disclose a container with

a spout. Furthermore, it does not disclose two seals, one at the top of the container, and a seal between a lower portion of the skirt and the main body of the container below the spout but above the container and closure-engaging members.

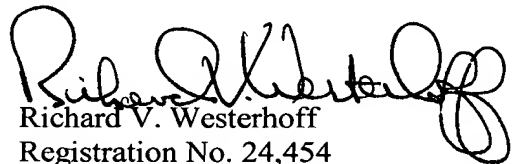
The Office Action relies on element 22 as comprising the second seal. Again, element 22 does not seal with anything and cannot at the same time be part of the upper seal and the lower seal. Accordingly, Montgomery does not anticipate independent Claim 12.

Claim 13 depends from Claim 12 and is therefore patentable over Montgomery for the same reasons.

9. Conclusion

As all of the claims on appeal have been rejected as anticipated by Montgomery, and Montgomery is directed to a different structure, that operates in a different way, to achieve a different result, the appealed claims are patentable over Montgomery and should be allowed.

Respectfully submitted,



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APPENDIX

1. A package comprising:

a container having a main body with an upper portion having closure engaging members thereon, and a spout extending upward and inward from the upper portion and topped with an upwardly and outwardly flared portion terminating in a rim defining a container opening;

a closure having an end wall extending across the container opening when in place on the container, and a skirt extending outward and downward from a periphery of the end wall and having an inner surface with container engaging members adjacent a lower end which engage the closure engaging members on the container to removably secure the closure to the container; and

sealing elements including an annular sealing flange extending downwardly and inwardly from the end wall of the closure and having an outer sealing surface which engages an inner sealing surface on the flared portion of the container, and an annular upper portion of the inner surface of the skirt being inclined downwardly and outwardly relative to the outer surface of the annular sealing flange to form with the annular sealing flange an upwardly converging annular gap into which the rim of the container is wedged as the container engaging members on the closure and the closure engaging members on the container engage.

2. The package of Claim 1 wherein the outer sealing surface of the annular sealing flange forms a first angle with a central axis of the container which is larger than a second angle formed with the central axis by the inner sealing surface on the flared portion of the container to provide interference between the outer sealing surface of the annular sealing flange and the inner sealing surface of the flared portion of the container as the closure is applied to the container.

3. The package of Claim 2 wherein the annular sealing flange is stiffer than the flared portion of the container such that the flared portion of the container is deformed by the interference between the outer sealing surface of the annular sealing flange and the inner sealing surface of the flared portion of the container to provide extended surface contact between the outer sealing surface of the annular sealing flange and the inner sealing surface of the flared portion of the container.

4. The package of Claim 1 wherein the annular upper portion of the inner surface of the skirt which is inclined downwardly and outwardly from the end wall is formed by an annular bead on the skirt.

10. The package of Claim 1 wherein the sealing elements further include an annular sealing member on one of the lower end of the inner surface of the skirt above the container engaging members and the main body of the container above the closure engaging members but below the spout sealing against the other.

11. The package of Claim 10 wherein the annular sealing member is on a lower portion of the inner surface of the skirt above the container engaging member.

12. A package comprising:

a container having a main body with an upper portion having closure engaging members thereon, and a spout extending upward and inward from the upper portion and terminating with a rim defining a container opening;

a closure having an end wall extending across the container opening when in place on the container, and a skirt extending outward and downward from the periphery of the end wall and having an inner surface with container engaging members adjacent a lower end which engaged the closure engaging members on the container to removably secure the closure to the container; and

sealing elements including first sealing elements forming a seal between the container and the closure adjacent the container opening, and second seal comprising an annular sealing member on one of the lower portion of the inner surface of the skirt above the container engaging members and on the main body of the container above the closure engaging members but below the spout which seals against the other of the lower portion of the inner surface of the skirt and the main body of the container.

13. The package of Claim 12 wherein the annular sealing member is on the lower portion of the inner surface of the skirt above the container engaging members and engages and seals against the main body of the container above the closure engaging members but below the spout with the container engaging members engaging the closure engaging members.